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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

FIONA HARVEY,

Plaintiff,

v.

NETFLIX, INC., and NETFLIX
WORLDWIDE ENTERTAINMENT,
LLC,

Defendants.

Case No. 2:24-cv-04744-RGK-AJR

**MEMORANDUM OF LAW IN
SUPPORT OF DEFENDANTS'
SPECIAL MOTION TO STRIKE**

Date: September 3, 2024
Time: 9:00 a.m.
Place: Courtroom 850

Hon. R. Gary Klausner

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I. INTRODUCTION.

Defendants Netflix, Inc. and Netflix Worldwide Entertainment, LLC (collectively, “Netflix”) create and distribute artistic content. Netflix provides storytellers like Richard Gadd (“Gadd”)—the creator of, and lead actor in, *Baby Reindeer* (the “Series”)—the opportunity to showcase their creative works. The Series—a dramatic work based on real events in Gadd’s life—follows Donny Dunn (“Donny”), a comedian who struggles with his sexual identity and past sexual abuse. The character Martha Scott (“Martha”) stalks, harasses, and physically assaults Donny, forcing him to confront his insecurities. Fiona Harvey, a woman who in real life actually stalked and harassed Gadd, attorney Laura Wray (“Wray”) and others, alleges that the Martha character *is* her and brings defamation and derivative claims against Netflix. Yet, Martha is not Harvey. Harvey is not a character name, and the Series never uses Harvey’s name in any way. Netflix and Gadd never identified Harvey as someone who stalked him (and others) in real life. Rather, it was Harvey who thrust herself into the spotlight and *identified herself* as the supposed inspiration for Martha.

The Series is a skillful exploration of sexual identity, sexual abuse, harassment, and stalking. The first episode begins with an eerie musical score and farcical interaction between two characters. The screen then abruptly goes dark, and “this is a true story” is slowly typed across the screen. While the Series is based on Gadd’s real-life trauma and emotions, the characters, scenes, dialogue, and events convey Gadd’s story in an imaginative style that has garnered critical acclaim, numerous awards, and eleven Emmy nominations. As is obvious to any reasonable viewer, the Series is *not* a factual documentary representing literally true details and imagery.

Harvey’s contrary claims are a baseless attack on Netflix’s exercise of free speech and barred by California’s anti-Strategic Lawsuits Against Public Participation (“anti-SLAPP”) statute. Her claims all challenge Netflix’s distribution

1 of the Series, which is plainly protected speech by the statute. It is thus Harvey's
 2 burden to establish that her claims have minimal merit, which she cannot. As even
 3 Harvey admitted during her interview with celebrity interviewer Piers Morgan,
 4 "Martha cannot be me . . . [she] is a fictional character." Harvey is correct: no
 5 reasonable viewer could understand the Series to make any statements of fact, let
 6 alone a statement specifically about Harvey.

7 All of that said: Harvey did, in fact, harass and stalk Gadd in real life. She
 8 sent him thousands of emails, handwritten letters, and social media posts, and left
 9 him hours of voicemails. Many of those communications, which Gadd provided to
 10 the police, included prurient, violent and astoundingly racist, xenophobic,
 11 homophobic, and otherwise hateful content: Harvey tells Gadd she wants to "stab
 12 [all Labour Party members] in the face," that she is glad she did not date Gadd
 13 because "[he] is gay and [she'd] have aids [sic]," and that she "hate[s] muslims" and
 14 is "a racist." Harvey's own statements—and the mountain of evidence of her
 15 conduct toward Gadd and others—demonstrate that any of the purportedly
 16 defamatory statements she alleges were substantially true. This too completely bars
 17 her claims. But even if the statements were not substantially true (and they are),
 18 then all Netflix has done is publish a memoir of Gadd's story, which viewers
 19 reasonably understand is told through his own emotions and self-reflections. This is
 20 opinion and thus cannot legally form the basis for her claims.

21 Finally, even if she could somehow overcome these constitutional protections,
 22 as a public figure, Harvey must demonstrate Netflix acted with actual malice in
 23 distributing the Series. She cannot. Her claims thus fail for this additional reason.
 24 Harvey is never mentioned in the Series, and there is a disclaimer in each episode to
 25 make clear the Series was fictionalized for dramatic purposes. Netflix clearly did
 26 not intend for viewers to understand the Series to state actual facts about Harvey.

1 Simply stated, Harvey cannot establish the minimal merit needed to overcome
2 the protections provided by the anti-SLAPP statute. The Court thus should grant
3 Netflix's motion and strike Harvey's complaint in its entirety.

4 **II. STATEMENT OF FACTS.**

5 **A. Gadd.**

6 Gadd is a well-known Scottish comedian, writer, and actor who conceived,
7 wrote, and starred in the Series. Declaration of Richard Gadd ("Gadd Decl.") ¶ 1.
8 Gadd was inspired to write the Series by his struggles with his sexual identity and
9 experiences with sexual abuse, harassment and stalking. *Id.* ¶ 8. He fictionalized
10 characters to assist in telling his own personal, real experiences with trauma. *Id.* ¶ 5.
11 He did not represent or make a statement about anyone real, including Harvey. *Id.*
12 ¶ 13. Instead, Gadd intentionally created characters that did not share the real names
13 of anyone from his real life and wrote fictionalized dialogue. *Id.* ¶ 10.

14 **B. Netflix.**

15 Netflix released the Series on its streaming service on April 11, 2024.
16 Declaration of Anne Mensah ("Netflix Decl.") ¶ 3. Netflix understood the Series
17 was a fictionalized work based on Gadd's real life. *Id.* ¶ 7. Netflix never would
18 have released the Series had it believed the Series somehow would be understood as
19 stating actual facts about any actual person. *Id.* ¶ 9. Netflix included a disclaimer
20 at the end of every episode to make this clear. *Id.* ¶ 8.

21 **C. Harvey.**

22 Harvey resides in England, and admits she was on the "shortlist" to be a
23 candidate for Parliament. Gadd Decl. Ex. 14. Harvey also has a publicly
24 documented history of stalking Laura Wray, a Scottish lawyer, wife of Labour Party
25 Member of Parliament Jimmy Wray; politician Donald Dewar, the inaugural First
26 Minister of Scotland; and Prime Minister Keir Starmer, before eventually stalking
27 Gadd. Declaration of Marvin S. Putnam ("Putnam Decl."), Exs. B, C, D. Harvey
28 stalked and harassed Wray, made death threats against Wray and her husband, and

1 made false reports to authorities that the couple mistreated their developmentally
2 disabled child. Declaration of Laura Wray (“Wray Decl.”) ¶¶ 14, 19. As a result,
3 Wray was granted an Interim Interdict against Harvey, *id.* ¶ 23, akin to a temporary
4 restraining order in the United States, *id.* ¶ 20. The press reported on Harvey’s
5 alleged stalking of Wray and Dewar, and Harvey issued a public denial of both.
6 Putnam Decl. Ex. M.

7 Harvey began stalking Gadd in 2014. Gadd Decl. ¶ 14. For three years, she
8 would show up at the pub (Hawley Arms) where he worked, follow him, and attend
9 his comedy shows. *Id.* ¶¶ 14-15. Harvey sent Gadd thousands of emails, hundreds
10 of voicemails, and handwritten letters, often including sexual, violent, and
11 derogatory content. *Id.* ¶ 23. Harvey, for example, warned Gadd to “shut [his]
12 ignorant little failed actor mouth” because he was “finished.” *Id.* Ex. 29. She
13 declared her gratitude that they had never dated because “you are gay and I’d have
14 aids.” *Id.* In another email, she raged that “the minute I see [Labor Party members]
15 I want to stab them in the face.” *Id.* Ex. 13. She repeatedly propositioned Gadd,
16 demanding that she “want[s] sex three times at night and twice in the morning.” *Id.*
17 Ex. 19. The communications were often filled with offensive, hateful speech,
18 including that she “hate[s] muslims,” *id.* Ex. 5, and is “a racist,”¹ *id.* Ex. 6. Harvey
19 also pinched and touched various parts of Gadd’s body, and on one occasion shoved
20 him in the neck and pointed in his face. *Id.* ¶¶ 17, 19. Gadd eventually obtained a
21 First Instance Harassment Warning against Harvey. *Id.* ¶ 53. Craig Seymour,
22 General Manager of the Hawley Arms pub, witnessed Harvey’s stalking and
23 harassment of Gadd first-hand, and describes her behavior as so “severe, unpleasant,
24 and nasty” that she was barred from the pub. Declaration of Craig Seymour
25 (“Seymour Decl.”) ¶¶ 1-10.

26
27
28 ¹ For more examples of this harassment, please see Exhibits 1-41, 44-45, 47-48, 49-
50 and 52 attached to the Gadd Declaration.

1 **D. The Series.**

2 The Series, which Netflix characterizes as an “offbeat, psychological”
3 dramedy, follows fictionalized character Donny (played by Gadd), an aspiring
4 comedian who grapples with his sexual identity and past sexual abuse. Netflix Decl.
5 ¶ 3.² While Donny’s character professes “this is a true story” once, in the first
6 episode, each episode disclaims that: “This program is based on real events:
7 however, certain characters, names, incidents, locations, and dialogue have been
8 fictionalized for dramatic purposes.” *See, e.g.*, Ep. 1 at 30:43.

9 In the Series, Donny first meets Martha at his bartending job when she enters
10 the pub crying. *Id.* at 02:06.³ Donny feels sorry for her and gives her a free drink;
11 Martha returns during Donny’s shifts. *Id.* at 02:25, 05:08. When Martha says she
12 needs someone to “hang her curtains,” Donny jokes, with sexual innuendo, that he’ll
13 “hang her curtains.” *Id.* at 08:54. Martha then starts appearing at his shows,
14 frequently emails, asks him on dates, and sends a “friend request” on Facebook. *Id.*
15 at 20:21, 23:07, 09:44, 27:37. This leads to Donny searching Martha’s name on the
16 Internet, and he discovers her history of stalking. *Id.* at 28:22.

17 When Donny begins dating a transgender woman, he struggles with shame
18 and embarrassment. Ep. 2 at 03:20. When she tries to publicly kiss him, he panics
19 and flees. *Id.* at 20:50. Martha suddenly appears, follows him down a dark alley,
20 corners him, and fondles him. *Id.* at 22:04. This assault triggers painful memories
21 of Donny’s prior sexual abuse. *See generally* Ep. 4. Martha, meanwhile, continues
22 to stalk Donny, sitting outside his house for hours and harassing him at his comedy
23 shows. Ep. 3 at 12:20, 14:10, 27:07. Donny repeatedly reports Martha to the police.
24 *See, e.g.*, Ep. 3 at 42:07; Ep. 5 at 15:44. When Donny provides the police Martha’s

25
26 ² The Complaint relies on the Series and attaches screenshots of scenes; the Court
27 thus may consider the entire Series, which is incorporated by reference. *See, e.g.*,
28 *Elliott v. Lions Gate Ent. Corp.*, 639 F. Supp. 3d 1012, 1021 (C.D. Cal. 2022). A
 copy of the Series will be lodged with the Court.

³ Citations to time stamps indicate time elapsed in the episode.

1 full name, they inform him that she once stalked a policeman. *Id.* Ep. 5 at 16:23.
2 Martha once again shows up at Donny’s work, they get into an argument, and Martha
3 hits Donny in the head with a glass, grabs his face, and digs her fingers into his eyes.
4 Ep. 6 at 14:10.

5 Shaken by the attack, Donny tries to perform at a comedy competition only to
6 become overwhelmed by emotion. *Id.* at 22:35. He suddenly details his history of
7 abuse in a cathartic monologue that goes viral, bringing Donny unexpected
8 recognition. *Id.*; Ep. 7 at 00:20. Martha then tracks down Donny’s cell number and
9 calls him incessantly. Ep. 7 at 1:47. At the police’s suggestion, Donny then listens
10 to hours of voicemails to show she is a threat. *Id.* at 10:00. Her rapid-fire chatter
11 overlays a montage of Donny’s daily activities. *Id.* at 10:40. Martha ultimately
12 threatens to stab someone, *id.* at 12:55, and in a “dramatic[]” scene, Compl. ¶ 56,
13 she pleads guilty to stalking and harassment, is sentenced to prison, and a restraining
14 order is issued. Ep. 7 at 13:34. After the sentencing, Donny stops into a bar and
15 orders a drink. *Id.* at 25:50. In a poetic, full-circle moment, Donny starts to cry and
16 the bartender offers him the drink for free. *Id.* at 26:26.

17 **E. Harvey’s Allegations.**

18 Harvey alleges “all viewers” of the Series understood that Fiona Harvey did
19 the “monstrous things” that the character Martha did in the Series. Compl. ¶ 29.
20 Harvey alleges viewers understood the Martha character to be the real-life Harvey
21 because Donny jokes he will “hang [Martha’s] curtains,” and Harvey allegedly once
22 sent a tweet to Gadd that made a similar reference. *Id.* ¶¶ 30-39. Harvey further
23 alleges she shares similarities with Martha that reinforce this understanding: (1) they
24 are both Scottish lawyers living in London who were accused of stalking a lawyer;
25 (2) Martha is older than Donny and Harvey is older than Gadd; (3) they “bear[] an
26 uncanny resemblance” to one another; and (4) they have similar accents and manners
27 of speaking. *Id.* ¶¶ 40-41. According to Harvey, Netflix’s statements on a marketing
28

1 website and before Parliament that the Series is a “true story” defame her for the
2 same reason. *Id.* ¶¶ 71-80.

3 Yet, Harvey concedes that her name does not appear in the Series, there are
4 no characters named after real persons, and dramatic scenes and content were created
5 to make the story emotionally compelling. *Id.* ¶¶ 27, 56, 60. Harvey also concedes
6 the portrayal of Martha is entirely “fabricated.” *Id.* ¶ 27.

7 Two weeks after the Series aired on Netflix, Harvey identified herself on
8 Facebook as the supposed inspiration for the Martha character. Putnam Decl. Ex. S.
9 She then went on *Piers Morgan Uncensored* to reaffirm her claims. *Id.* ¶¶ 3-17,
10 Ex. A.

11 **III. LEGAL STANDARD.**

12 California enacted the anti-SLAPP statute to deter lawsuits that would
13 otherwise “chill the valid exercise of the constitutional right[] of freedom of speech.”
14 *Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 192 (2005). The statute creates a
15 “special motion to strike” such claims. *See Baral v. Schnitt*, 1 Cal. 5th 376, 392–94
16 (2016). If all causes of action are premised on protected activity, the Court must
17 strike the entire complaint. *See Int’l Un. Of Operating Eng’n, Local 39 v. Macy’s,*
18 *Inc.*, 83 Cal. App. 5th 985, 996 (2022).

19 In evaluating an anti-SLAPP motion, the Court performs a two-step analysis.
20 First, the defendant must show that plaintiff’s claims arise from an act in furtherance
21 of free speech under the United States or California Constitutions. Cal. Code Civ.
22 Proc. § 425.16(b)(1). Once the moving party has shown that the challenged claims
23 arise from protected activity, the court presumes the purpose of the action was to
24 chill the defendant’s exercise of its First Amendment rights. *Greater L.A. Agency*
25 *on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 422 (9th Cir. 2014).
26 The nonmoving party then must demonstrate that the challenged claim is legally
27 sufficient and substantiated. *Trinity Risk Mgmt., LLC v. Simplified Lab. Staffing*
28 *Sols., Inc.*, 59 Cal. App. 5th 995, 1003–04 (2021). “If the nonmovant fails to meet

1 either of [those] two requirements, the claim is subject to immediate dismissal.” *See*
2 *Heller v. NBC Universal, Inc.*, 2016 WL 6583048, at *3 (C.D. Cal. June 29, 2016).

3 **IV. THE COURT SHOULD GRANT NETFLIX’S MOTION.**

4 Harvey’s claims are premised on Netflix’s distribution of a fictionalized
5 television series and therefore arise from protected activity. The burden thus shifts
6 to Harvey to demonstrate her claims have minimal merit. She cannot meet this
7 burden. She cannot establish Netflix made a provably false statement of fact *about*
8 *her*. Even if she could get past these essential steps, she cannot show that Netflix
9 acted with actual malice. Her Complaint must be stricken.

10 **A. Harvey’s Claims Arise From Protected Activity.**

11 Harvey’s claims plainly arise from protected activity. They are premised on
12 distribution of the Series. And the Series constitutes discourse of widespread public
13 interest.

14 1. The Claims Arise Out of Conduct in Furtherance of Speech.

15 The creation of film and television are core free speech activities protected by
16 the First Amendment. *See De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th
17 845, 849–50 (2018); *Tamkin v. CBS Broad., Inc.*, 193 Cal. App. 4th 133, 143–44
18 (2011); *Brodeur v. Atlas Enter., Inc.*, 248 Cal. App. 4th 665, 674 (2016). Netflix’s
19 distribution of the Series is therefore protected speech entitled to protection under
20 the anti-SLAPP statute. *Id.*; *see also De Havilland*, 21 Cal. App. 5th at 851, 856–
21 57, 859–60 (anti-SLAPP protection for airing a television series); *Brodeur*, 248 Cal.
22 App. 4th at 674–78 (same).

23 2. The Speech Is Connected with an Issue of Public Interest.

24 The subject matter of the Series—sexual abuse, harassment and stalking—are
25 indisputably topics of widespread, public interest. *See, e.g., M.G. v. Time Warner,*
26 *Inc.*, 89 Cal. App. 4th 623, 629 (2001) (child molestation issue of public interest);
27 *Cross v. Cooper*, 197 Cal. App. 4th 357, 375 (2011) (sex offender); *Sipple v.*
28 *Foundation for Nat’l Progress*, 71 Cal. App. 4th 226, 238 (1999) (domestic

1 violence). This is further evidenced by the media attention to the Series including
2 its writing, directing, and acting. Putnam Decl., Exs. G-L; Netflix Decl. at ¶ 4; *see*
3 *also, e.g., Tamkin*, 193 Cal. App. 4th at 143 (television show protected where public
4 demonstrated interest in creation).

5 The subject matter of the Series also allegedly concerns Gadd, who is
6 indisputably in the public eye. *See, e.g.,* Compl. ¶¶ 19-20, 24, 27; Gadd Decl. ¶¶ 2-
7 4, 8. Gadd has been a recognized actor and writer for years. *See* Putnam Decl., Exs
8 B-G. There is a “public interest which attaches to people [like Gadd] who, by their
9 accomplishments, mode of living, professional standing or calling,” attract the
10 public’s “attention to their activities.” *Stewart v. Rolling Stone LLC*, 181 Cal. App.
11 4th 664, 677–78 (2010).

12 **B. Harvey’s Claims Are Meritless.**

13 As Harvey’s claims arise from protected activity, she has the burden to prove
14 they are legally sufficient and substantiated. She cannot for four independent
15 reasons: (1) she cannot establish Netflix made any provably false statement *about*
16 *her*; (2) the statements are substantially true; (3) the statements are legally protected
17 opinion; and (4) Harvey, a public figure, cannot establish actual malice.

18 1. Harvey Cannot Show Netflix Made Provably False Statements
19 of Fact About Her.

20 A defamation claim must be premised on a statement that is provably false;
21 statements cannot form the basis of a defamation action if they cannot reasonably be
22 interpreted as stating actual facts *about an individual*. *Ferlauto v. Hamsher*, 74 Cal.
23 App. 4th 1394, 1401 (1999). Courts thus consider “whether a reasonable person . . .
24 would understand that the fictional character therein pictured was, in actual fact, the
25 plaintiff acting as described.” *Tamkin*, 193 Cal. App. 4th at 146. Courts do so by
26 looking at the “totality of the circumstances.” *Knievel v. ESPN*, 393 F.3d 1068,
27 1074-75 (9th Cir. 2005). Courts consider the broad context for the statements,
28 including the general tenor of the work, the specific context and content of the

statements, the extent of figurative or hyperbolic language, the reasonable expectations of the audience, and “whether the statement itself is sufficiently factual to be susceptible of being proved true or false.” *Id.* at 1075; *see also De Havilland*, 21 Cal. App. 5th at 866–67 (2018) (courts must analyze statement’s broad context). In context, no reasonable viewer could understand the Series to convey statements of fact about Harvey. She is never mentioned.

a. *No Reasonable Viewer Could Understand The Series As Making Factual Statements About Harvey.*

Harvey does not contend the Series uses historical footage of her, uses her name or names of real persons, or depicts real events from her actual life. Nor could she. The Series includes fictional characters, events, and dialogue employed specifically to explore traumatic experiences from Gadd’s life. *See* Gadd Decl. ¶¶ 5, 8, 13.

Harvey therefore stakes her entire case on her allegation that internet sleuths supposedly identified her from a single tweet sent a decade ago from an account @FionaHarvey2014 to @MrRichardGadd. Compl. ¶ 35. According to Harvey, this single tweet made it easy for members of the public to identify her as the Martha character. *Id.* ¶ 36. But the test is not whether a select group of uniquely motivated individuals can ferret out a possible connection between a real person and a fictional character. *See Standing Committee on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman*, 55 F.3d 1430, 1437-38 (9th Cir. 1995) (specialized audience not representative of reasonable person); *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 626 (D.C. Cir. 2001) (same). Rather, it is Harvey’s burden to show that *reasonable viewers* would understand Martha to be Harvey. *Aguilar v. Universal City Studios, Inc.*, 174 Cal. App. 3d 384, 391 (1985). This she cannot do.

Harvey merely asserts that broad similarities between her and Martha—*e.g.*, that she is a lawyer, living in London, older than Gadd, accused of stalking a lawyer—would cause a reasonable viewer to understand the Series to be “of and

1 concerning” her. Compl. ¶¶ 40-41. Such generalities are insufficient. *See e.g.*,
2 *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal. App. 4th 318, 320, 322
3 (1997) (statements not “of and concerning” plaintiff despite character sharing similar
4 name); *Aguilar*, 174 Cal. App. 3d at 388 (no reasonable viewer would understand
5 film to be about plaintiff despite sharing name with character and being involved in
6 real events portrayed); *Sarver v. Hurt Locker LLC*, 2011 WL 11574477, at *8 (C.D.
7 Cal. Oct. 13, 2011) (same); *Tamkin*, 193 Cal. App. 4th at 146-47 (similar names,
8 occupations, and other characteristics insufficient). This is especially true here given
9 that Harvey disclaims any other similarities between herself and Martha, who she
10 admits is entirely “fabricated.” Compl. ¶ 27; Putnam Decl. ¶¶ 4-17, Ex. A at 7:33;
11 14:49; 17:22. The alleged broad similarities do not demonstrate a reasonable viewer
12 would understand the Series to be about Harvey. Indeed, members of the public
13 have speculated that several other women and a man, sharing many of the same
14 qualities, may have been the inspiration for the Martha character. Putnam Decl.
15 Exs. Q, S.

16 Moreover, the general tenor, style, and format of the Series ensure that a
17 reasonable viewer would not understand it to convey literally factual statements—
18 including the stylized card that reads “this is a true story” in Martha’s trademark
19 font. The Series makes clear to the viewer that they are watching a fictionalized
20 work. It does not purport to be a documentary. Rather, as Harvey concedes, the
21 Series employed actors, writers, producers, and executives who “fabricated” the
22 story to make it “more captivating.” Compl. ¶ 27. And the Series is replete with
23 cinematic elements, including, *inter alia*, a dramatic score, creative cinematography,
24 reverse and inconsistent chronology, intentionally ironic and absurd scenes, and a
25 disembodied narrator that gives the audience insight into Donny’s thoughts, that
26 remind the viewer that this is not a documentary or even an attempt at realism. Ep.
27 1 at 00:10; 01:36; Ep. 4 at 08:20; 20:21; Gadd Decl. ¶¶ 5, 9-10, 13. *See e.g.*,
28 *Partington v. Bugliosi*, 56 F.3d 1147, 1154-55 (9th Cir. 1995) (tenor of dramatized

1 films about real events negate impression that statements represent assertion of fact).
2 And the disclaimer appearing in *every episode* of the Series dispels any notion that
3 it is depicting real events as they happened, which alone defeats Harvey's claims.
4 *See, e.g., Brodeur*, 248 Cal. App. 4th at 680 (no reasonable viewer would understand
5 film as conveying objective facts given disclaimer); *Mossack Fonseca & Co., S.A.*
6 *v. Netflix, Inc.*, 2020 WL 8510342, at *4 (C.D. Cal. Dec. 23, 2020) (no reasonable
7 viewer would interpret film as conveying fact given disclaimer stating film is
8 fictionalized for dramatization); *Sarver*, 2011 WL 11574477, at *8 (same).

9 b. *The Context Demonstrates the Alleged Statements Are Not*
10 *Factual.*

11 None of the claimed defamatory statements can, in context, be construed by a
12 reasonable viewer as factual, *i.e.* that: (1) Martha had received a 4.5 year prison
13 sentence; (2) Martha was a convicted stalker; (3) Martha sexually assaulted Donny
14 by grabbing his genitals; (4) Martha stalked Donny by sitting outside his house for
15 hours a day; (5) Martha stalked a policeman; (6) Martha assaulted Donny by
16 smashing a glass into his head and gouging his eyes; and (7) Martha pleaded guilty
17 and was convicted of stalking and harassment, sentenced to nine months in prison
18 and had a five-year restraining order issued against her.⁴ Compl. ¶¶ 52-70. To the
19 contrary, each is presented in the context of stylistic, cinematic choices that only
20 reaffirm for the viewer that the Series is not a precise portrayal of historical fact. As
21 but one example, Martha's prior stalking conviction is revealed as the Turtles' peppy
22 "Happy Together" is played. Ep. 1 at 28:38. The clash of dark content and the
23 upbeat, romantic ballad reminds the viewer that this is clearly not a documentary.

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25

⁴ The statements allegedly made on Tudum.com and by Mr. King before Parliament
26 are likewise not identifiable as statements of fact *about Harvey*. These statements
27 also never mention Harvey, and no reasonable viewer of the Series would understand
28 those statements to concern her. Regardless, statements before Parliament are
absolutely privileged under Cal. Civ. Code § 47(b) and cannot form the basis of a
defamation claim. *See Scott v. McDonnell Douglas Corp.*, 37 Cal. App. 3d 277, 288,
293 (1974); *Pettitt v. Levy*, 28 Cal.App.3d 484, 488 (1972).

1 *Films of Distinction, Inc. v. Allegro Film Prods., Inc.*, 12 F. Supp. 2d 1068, 1081
2 (C.D. Cal. 1998) (use of rhetoric to convey defamation negates supposed assertion
3 of objective fact).

4 In fact, the fantastical, surreal cinematic elements that accompany Martha
5 grabbing Donny’s genitals, sitting outside his house for days, and being convicted
6 and sentenced all make clear that the Series is not a realistic portrayal of real-life
7 events. Martha’s assault follows Donny’s date where cinematography and sound
8 illustrate Donny’s growing queasiness and literal tunnel vision. Ep. 2 at 20:50. So
9 too, Martha’s lengthy vigil outside Donny’s house is dramatically accelerated,
10 showing the passage of time as days fade into night and back to day. Ep. 3 at 14:10.
11 And the Martha character’s final conviction and sentencing is preceded by a frenetic
12 sequence that involves her voice playing over a montage of Donny—the audio often
13 sped up or reversed to add to the fever-dream quality of the scene. Ep. 7 at 12:24.
14 Immediately following is a perfectly poetic moment where Donny finds himself in
15 the same situation where he met Martha. *Id.* at 28:18. In these contexts, and in the
16 context of the Series as a whole, no reasonable viewer would understand the Series
17 to be making statements of fact. *See Khodorkovskaya v. Gay*, 5 F.4th 80, 86–88
18 (D.C. Cir. 2021) (context not factual where dramatic devices framed statements);
19 *see also Brodeur*, 248 Cal. App. 4th at 680 (statement not factual where made by
20 “slightly unhinged” character).

21 2. The Alleged Defamatory Statements Are Substantially True.

22 The alleged defamatory statements (*i.e.*, Harvey is a convicted stalker who
23 stalked, sexually assaulted and violently attacked Gadd) are *substantially true*.
24 Substantial truth is a complete defense to alleged defamation, and a statement is
25 substantially true so long as its substance or gist is justified. *See Elliott*, 639 F. Supp.
26 3d at 1027; *Karimi v. Golden Gate School of Law*, 361 F. Supp. 3d 956, 979 (N.D.
27 Cal. 2019). Courts thus routinely hold that where, as here, plaintiff engaged in
28 conduct akin to that asserted by defendant, a defamation claim must be dismissed.

1 *Elliott*, 639 F. Supp. 3d at 1026-27.

2 The evidence proves that Harvey (i) stalked and harassed Wray, Gadd, and
3 others; (ii) sexually and physically assaulted Gadd; and (iii) faced legal
4 consequences for her criminal conduct warranting conviction if prosecuted. *See*
5 Gadd Decl. ¶¶ 16-17, Wray Decl. ¶¶ 8-13, Seymour Decl. ¶¶ 1-10. In many respects,
6 Harvey’s actual conduct is far *worse* than Martha’s cinematic actions. The
7 thousands of actual emails, handwritten letters, social media posts, and voicemails
8 sent by Harvey are awash with violent hate speech and sexually explicit, deeply
9 disturbing vitriol that is nowhere depicted in the Series. Gadd Decl. Exs. 3-41.
10 Indeed, Louise Oakley, an experienced Senior Prosecutor in the United Kingdom,
11 reviewed Gadd, Wray, and Seymour’s declarations and Harvey’s emails, letters, and
12 voicemails and concludes “there was sufficient evidence to provide a realistic
13 prospect of conviction” of stalking punishable by up to eight years in prison. *See*
14 Expert Declaration of Louise Michelle Oakley ¶¶ 80-84. Harvey cannot show that
15 her real-life offenses would have a different—and *more positive*—effect on the
16 audience than the allegedly defamatory statements. *Jackson v. Mayweather*, 10 Cal.
17 App. 5th 1240, 1262–63 (2017), as modified (Apr. 19, 2017) (no defamation where
18 plaintiff could not establish inaccurate statement would have *more negative* effect
19 than truth). The alleged defamatory statements are thus nonactionable as they are
20 substantially true.⁵

21 3. Alleged Defamatory Statements Are Non-Actionable Opinion.

22 Even if the alleged defamatory statements were not substantially true (and
23 they are), the First Amendment protects Richard Gadd’s right to tell his own story,
24 his way. The law protects “an author writing about a controversial occurrence [who]
25 fairly describes the general events involved and offers his personal perspective about
26

27 ⁵ Given Harvey’s history of stalking, harassment, and resulting legal action—
28 publicized before the Series’ distribution—Harvey is also libel-proof. *See Wynberg*
v. Nat’l Enquirer, Inc., 564 F. Supp. 924, 927-28 (C.D. Cal. 1982). The purported
defamatory statements are therefore not actionable for this additional reason.

1 some of its ambiguities and disputed facts.” *Partington*, 56 F. 3d at 1154. Crucially,
2 where the storyteller was personally involved in the controversial story, viewers and
3 listeners fully expect that the storyteller is biased and preferential to his own view.
4 *See Ferlauto*, 74 Cal. App. 4th at 1401-03. In these circumstances, “language which
5 generally might be considered as statements of fact may well assume the character
6 of opinion.” *Id.* at 1401-02; *see also Underwager v. Channel 9 Australia*, 69 F.3d
7 361, 367 (9th Cir. 1995). In the Series, Gadd told of a trying, troubling point in his
8 life, which viewers reasonably understood was colored by his own viewpoint. In
9 this context, the alleged defamatory statements “assume the character of statements
10 of opinion” and are not actionable. *Ferlauto*, 74 Cal. App. 4th at 1401-02; *see also*
11 *Partington*, 56 F. 3d at 1154; *Heller*; 2016 WL 6583048 at *7.

12 4. Harvey Cannot Establish Actual Malice.

13 Even if Harvey were able to surmount all these precursor elements of
14 defamation, she cannot come close to meeting the exacting standard for actual
15 malice. The First Amendment prohibits public figures from asserting defamation
16 claims unless they demonstrate the defendant made the alleged defamation with
17 “actual malice.” *De Havilland*, 21 Cal. App. 5th at 856. Harvey is indisputably a
18 public figure. For instance, courts have consistently held that persons running for
19 office are the paradigmatic public figures. *See Kapellas v. Kofman*, 1 Cal. 3d 20, 36
20 (1969); *see also Mosesian v. McClatchy Newspapers*, 233 Cal. App. 3d 1685, 1696
21 (1991). Harvey admits she not only ran for Parliament but was “o[n the] shortlist[.]”
22 Gadd Decl. Ex. 14; *see also* Putnam Decl., Exs. M, T. She is thus precluded from
23 now claiming she is not a public figure. Harvey also voluntarily injected herself into
24 a public controversy, namely her stalking and harassment of Laura Wray and Donald
25 Dewar. Compl. ¶ 41; Putnam Decl. Ex. M. Thus, at a minimum, Harvey is a limited
26 purpose public figure on issues related to stalking, harassment, and assault. *Planet*
27 *Aid, Inc. v. Reveal*, 44 F.4th 918, 927 (9th Cir. 2022); *see also Denney v. Lawrence*,

28

1 22 Cal. App. 4th 927, 936 (1994) (plaintiff limited purpose public figure where he
2 thrust himself into controversy).

3 Either way, Harvey would need to prove by “clear and convincing evidence”
4 that Netflix made the alleged defamatory statements with actual malice—that is,
5 knowing the Series “would create a false impression about [her] or act[ing] with
6 reckless disregard for the truth.” *De Havilland*, 21 Cal. App. 5th at 869.
7 Fictionalized works like the Series are by definition false and Netflix’s mere
8 broadcast does not somehow demonstrate actual malice. *Id.*; *Dworkin v. Hustler*
9 *Magazine, Inc.*, 668 F. Supp. 1408, 1418 n.15 (C.D. Cal. 1987). Harvey instead
10 must demonstrate Netflix either hoped to insinuate the “defamatory import” or
11 “knew or acted in reckless disregard of whether [their] words would be interpreted
12 by the average [viewer] as defamatory statements of fact.” *De Havilland*, 21 Cal.
13 App. 5th at 869-70. This she cannot do.

14 Rather, Netflix’s conduct demonstrates it did not intend viewers to understand
15 the Series to state any actual facts about Harvey. Netflix never publicly named or
16 mentioned Harvey. Netflix Decl. ¶ 10. And Netflix understood that Gadd
17 purposefully created fictitious characters, and invented dialogue and scenes. *Id.* ¶ 7.
18 Each episode also contained a disclaimer to make clear the Series was fictionalized
19 for dramatic purposes. *Id.* ¶ 8. Harvey also acknowledges that both Netflix and
20 Gadd attempted to disguise any sources of inspiration for Gadd’s work. Compl.
21 ¶¶ 34, 77. This is the antithesis of actual malice.⁶ Such conduct instead
22 demonstrates that Netflix intended viewers to understand the work to be fictional
23 and did not act with reckless disregard. *See Dworkin v. Hustler Magazine, Inc.*, 867
24 F.2d 1188, 1194-95 (9th Cir. 1989).

25
26 ⁶ Netflix’s alleged failure to conduct due diligence cannot legally establish actual
27 malice, as failure to investigate does not demonstrate bad faith, even when a
28 reasonably prudent person would have done so. *Beilenson v. Super. Ct.*, 44 Cal.
App. 4th 944, 952 (1996); *Christian Rsch. Inst. v. Alnor*, 148 Cal. App. 4th 71, 90-
91 (2007); *Reader’s Digest Ass’n v. Super. Ct.*, 37 Cal. 3d 244, 258 (1984).

1 **C. Harvey's Other Claims Should Also Be Stricken.**

2 Harvey's other claims for intentional infliction of emotional distress,
3 negligence, gross negligence, and right of publicity (Compl. ¶¶ 97-130) are premised
4 on the same publication (the Series) as the defamation claim, and thus should be
5 stricken as duplicative. *See, e.g., Gilbert v. Sykes*, 147 Cal. App. 4th 13, 34 (2007)
6 (striking duplicative IIED); *Planet Aid, Inc. v. Ctr. for Investigative Reporting*, No.
7 17-CV-03695-MMC, 2021 WL 1110252, at *24 (N.D. Cal. Mar. 23, 2021) (striking
8 duplicative negligence claim); *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798,
9 812 (2002) (same). These claims also independently fail for the reasons set forth in
10 Netflix's concurrently filed motion to dismiss. *See* MTD at 11-17.

11 **V. CONCLUSION.**

12 Netflix respectfully requests that the Court grants its motion to strike.

13
14 Dated: July 29, 2024

Respectfully submitted,

15 LATHAM & WATKINS LLP
16 Marvin S. Putnam

17 By /s/ Marvin S. Putnam
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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendants Netflix, Inc., and Netflix Worldwide Entertainment, LLC, certifies that this brief contains 5,584 words, which complies with the word limit of the Court's standing order. In making this calculation, I have relied on the word count of the word-processing system used to prepare the document.

Dated: July 29, 2024

By: /s/ Marvin S. Putnam
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